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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE PERKINS CAMPBELL COMPANY, APPELLANT,
v.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON, GIBSON & WILLIAMS, LAW PRINTERS

In the Supreme Court of the United States.

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THE PERKINS CAMPBELL COMPANY, appellant, v. THE UNITED STATES. } No. 183.

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STATEMENT.

This is an appeal from a judgment of the Court of Claims which sustained the demurrer of the Government and dismissed the plaintiff's petition.

The Perkins-Campbell Company, appellant, is an Ohio corporation which was engaged during the war in the manufacture of harness at Cincinnati (R. 1). On August 10, 1917, it contracted to deliver to the United States 35,000 sets of ambulance and wagon harness. (R. 1, pgh. 3; R. 2, pgh. 8.) The contract was not executed in accordance with Sec. 3744 of the Revised Statutes (R. 6, pgh. 27; R. 16, Exhibit B), but the appellant proceeded in good faith with the

work under it, and the United States accepted all of the harness delivered.

A year later, in August, 1918, the contractor had delivered 3,000 sets of harness, had cut its leather for 17,000 more (R. 2, pgh. 10) and "had made commitments and incurred expense for the fabrication of the full 35,000 sets" (R. 4, pgh. 16). At this juncture negotiations were had for a modification of the original contract and the allotment of a new one. These were embodied in the following memorandum of August 22, 1918 (R. 2, pgh. 11):

> In accordance with our understanding in canceling ambulance harness, of which we have 32,000 yet to manufacture, we will agree to allow 15,000 sets of these harness without expense to the Government with the understanding that we are to be allotted 10,000 dump-cart harness, Quartermaster Corps, at $45 per set.

On October 22, 1918, the Government signified its acceptance of the terms of this understanding by the following letter (R. 3, pgh 13):

> WAR DEPARTMENT,
> OFFICE QUARTERMASTER GENERAL
> OF THE ARMY,
> *Washington, Oct. 22, 1918.*
>
> No. 4551.
> From: Clothing & Equipage Division, Leather Subdivision, Unit G, Potomac Park.
> To: Perkins Campbell Company, Cincinnati, O.
> Subject: Cancellation of Contract.
>
> 1. This to inform you that 15,000 s. s. four-mule ambulance or wagon harness as per

specification j–124, 7,500 s. s. each lead and wheel, have been canceled from P. O. 2788, dated August 10, 1917, which was issued to you for 35,000 s. s. of above harness.

2. In lieu of this cancellation, award has been made you for 10,000 s. s. cart harness at $45 per set on contract L–357–J. This contract is now in process of preparation and will go forward to you for signature within several days.

By authority of the Acting Quartermaster General, Azel F. Cochran, Captain, Quartermaster Corps, U. S. A., in charge of Contracting Section.

The next day, October 23, 1918, the following telegram was sent to the contractor (R. 3, pgh. 14):

334, p. 23. WASHINGTON, D. C.

PERKINS CAMPBELL COMPANY,

Cincinnati, Ohio.

Telegram referring to 10,000 dump cart harness received. Cancellation and award of 10,000 sets approved. Contract now before Review Board but has not been approved by them. Use your own judgment in cutting harness. Will notify you when contract is approved.

WOOD HARNESS COCHRAN.

This was evidently a reply to a telegram from the contractor, the contents of which are not set forth in the petition.

As soon as the parties had reached the understanding set out above, they both proceeded in good faith upon the supposition that the original contract had

been modified and reduced and the new one had become effective. The contractor suspended all operations upon the original (in excess of 20,000 sets) and began work under the new one. (R. 4, pgh. 19; R. 5, pghs. 23 and 24.) There was a complete meeting of the minds and nothing remained to be done but to reduce the agreement to writing and formally execute it. That the contractor attached no importance to the legal formalities required in the execution of the contract is evidenced from the fact that they had proceeded without objection or protest for more than a year to perform the original contract which was not properly executed. (R. 6, pgh. 27.)

On November 15, 1918, the Government requested the appellant to suspend operations under both contracts (R. 5, pgh. 25). This was done, and as soon as the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272) was passed the contractor filed with the War Department Claims Board two separate claims, one for losses under the old contract and another for losses under the new (R. 6, pgh. 31). The procedure whereby such claims were to be heard and settlements negotiated is set forth in various General Orders and Supply Circulars which may be found in "Decisions of the War Department, Board of Contract Adjustment, Volume I, January 22 to October 10, 1919," which volume will be cited hereafter as "Dec. War Dept."

Under Supply Circular No. 17, paragraph 1, all claims were divided into two classes designated "A" and "B." The former were those based upon agree-

ments "which have been reduced to contract form or are otherwise established by written evidence," while the latter comprised "claims based on all other agreements covered by the provisions of Section 1 of said [Dent] Act." (Dec. War Dept. XLVII.) Both claims made by the contractor were Class A claims (R. 6, pgh. 31). It was further provided that all claims should be forwarded to Washington to the Claims Board in charge of the adjustment of claims for the particular bureau of the War Department which had made the contract. In this case it was the "Claims Board, Director of Purchase." (Dec. War Dept. XLVII.) The first duty of this board in handling Class A claims was to "examine into and determine the facts as to the nature, terms, and conditions of the alleged agreement referred to in the statement of claim" and to make a certificate, "Form C," which should consist of the written agreement upon which the claim was based. This certificate, when prepared, was submitted to the claimant, and it was provided that "no award can be made until the claimant's acceptance and approval of the certificate has been indorsed thereon." (Dec. War Dept. XLVIII.)

In the instant case the contract upon which the first claim was based was the contract of August 10, 1917, which was properly embodied as "Form C" to be attached to the claim. (R. 7, pghs. 34 and 35; R. 16, Exhibit B.) The petition does not specifically disclose what composed "Form C" attached to the second claim, but the inference from facts stated in

the petition is that it consisted of the writings of August 22 and October 22 and 23 set out above.

Both of these claims were then forwarded to a Zone Board at Jeffersonville, Indiana, whose duty it was to "make detailed examinations of the claim and to recommend a fair and equitable basis for the adjustment, payment, or discharge thereof." (Dec. War Dept. XLVIII.) The Zone Board found in its examination of these claims that "the offer of September 27, 1918 [August 22, 1918], set out in paragraph 11 above [petition] and the letter of October 22, 1918, constituted a supplemental contract between the United States and the claimant whereby the claimant surrendered its right to deliver 35,000 sets of ambulance harness" (R. 8, pgh. 37), and insisted that the claimant submit figures which would enable the Board to make an award on the basis of the revised contract. The contractor was informed that he might appeal from this decision to the Board of Contract Adjustment, which had appellate jurisdiction in such matters. (See Dec. War Dept. XXXIII–XXXVII.)

On June 30, 1919, the last day upon which claims might be filed under the Dent Act, the contractor filed with the Board of Contract Adjustment what is said to be a third claim, independent of the others, which sought to recover that part of its expenditures on the original contract which had been refused by the Zone Board. (R. 9, pgh. 44.)

Thus the matter stood until December 18, 1919, when awards of $80,385.15 upon the first and

$71,705.76 upon the second claim were made by the Secretary of War and accepted by the claimant "in full adjustment, payment, and discharge of said agreements." (R. 20–28.)

Later, on March 20, 1920, the third claim was dismissed by the Board of Contract Adjustment on the ground that full satisfaction had been made to the claimant (R. 10, pgh. 46), and upon appeal to the Secretary of War this decision was affirmed on August 19, 1920 (R. 10, pgh. 48). More than eighteen months thereafter, the claimant filed its petition in the Court of Claims to which the Government demurred. From the decision of the Court sustaining the demurrer, this appeal is taken.

I.

The original contract was modified by mutual agreement.

It is clear from the allegations of the petition that the original contract was actually modified by the subsequent agreement of the parties. The proposal of the contractor is clearly stated in the memorandum of August 22, and the Government's acceptance in the terms of the offer is as clearly set forth in its letter of October 22 (R. 2, 3). No refinement of reasoning can rob them of the legal effect which they have and which the parties at the time intended that they should have.

It is pleaded in the petition, and earnestly contended in the Appellant's brief, however, that its proposal could only be accepted by the Government

by means of a contract signed, sealed, executed, and bound with the red tape prescribed in Revised Statutes, sec. 3744. Both the language and the conduct of the contractor are at variance with this conclusion. The offer was to reduce the original contract "with the understanding that we are to be *allotted* 10,000 dump-cart harness." The new contract was "allotted," and notice of the fact was given the contractor. The suggestion now made that the acceptance was not complete or effective until a contract was formally executed, is manifestly an afterthought; for the petition shows that the contractor had actually proceeded without objection for more than a year in performance of a contract (the original agreement of Aug. 10, 1917) which had not been so executed. And, as we shall have occasion to observe hereafter, both parties treated the new contract as an effective one.

It is conceded by the appellant that the minds of the parties had met in mutual understanding as to the new contract and its attendent modification of the old, and all that remained to be done was to execute the formal document. "It had been the experience of the claimant that the duly executed contract would follow in due course the notice of allotment" (R. 5, pgh. 20). To this state of facts the language of Mr. Justice Holmes in a recent case is directly applicable (*American Smelting Company* v. *United States*, 259 U. S. 75, 78):

> Of course the expressed contemplation of a more formal document did not prevent the

letters from having the effect that otherwise they would have had.

The execution of a formal contract was not necessary to make the new contract valid and binding upon the contractor (*United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88) and accordingly was not necessary to effect a modification of the original.

Thus the facts disclosed by the petition show that the original contract was modified by reducing the number of sets of harness to be delivered from 35,000 to 20,000 and that the appellant has no right to recover more than it has already received.

II.

There was no fraud, accident, or mutual mistake.

The petition prays for a reformation, on account of mutual mistake, of the award or settlement which the War Department made upon the original contract. As the petition does not use the word "mistake," some pains have been expended to show in the appellant's brief that the allegations really amount to an averment of mistake. The difficulty, however, is not in the failure to use a particular form of words, but in the fact that the petition shows so clearly that there really was no mistake.

The mistake supposed to exist consisted of attaching to the award made upon the original contract a copy of that contract in its original instead of its modified form. The appellant accepted this award and now avers that neither it nor the United States intended that it should be a settlement of the

whole claim, but of that part only which related to 20,000 sets of harness. But here again the conduct of the parties belies the contention.

As soon as the Government notified the contractor on October 22, 1918, of its acceptance of the proposal to modify the original agreement, the appellant suspended all operations under it (in excess of 20,000 sets) and began work upon the new contract. An examination of Schedule "A" of the award made under the second contract (R. 27) shows to what extent the work under it had been carried. On November 15, when the Government suspended its war time operations it sent notice to the appellant to discontinue work under *both* contracts (R. 5, pgh. 25). If the appellant then thought that the original contract had not been modified and that the new one had not become effective, it would have said so at this time.

Later an opportunity was afforded by the Dent Act for a speedy adjudication of its claims, and again the appellant treated the situation as if there were two contracts existing, for it filed claims with the War Department under *both* contracts. If it had then considered the original contract as unamended and unmodified, it would have presented a single claim under that contract.

Both the petition and the brief attach great importance to the fact that on May 29, 1919, the Claims Board, Director of Purchase, and the appellant executed the certificate, "Form C," provided for by Supply Circular No. 17, and embodied therein the

original contract of August 10, 1917, without amendment. It is said in paragraph 32 of the petition that "If such agreement had been modified or amended after execution, it was required to so find and to attach a copy of such amendment," and in paragraph 34 that "The said Claims Board did not find that said agreement had been amended" (R. 7). We have examined Supply Circular No. 17 with care and have found no such requirement in it. Nor do we find that the certificate so made was a final finding and determination of the contents of the agreement. In this case the amendment which effected the modification of the original contract was itself the basis of a second claim. It was not necessary, therefore, that it be attached to and set out in the first. It was before the Department, and when the claims came to be considered the effect of the second upon the first would clearly appear.

As soon as these claims came before the Zone Board which was to make a "detailed examination of the claims and to recommend a fair and equitable basis for the adjustment, payment, or discharge thereof" (Dec. War. Dept. XLVIII), that Board found that the original contract had been reduced to 20,000 sets. (R. 8, pgh. 37.) It accordingly advised and insisted that the claimant supply it with figures which would represent its claim upon this basis. This was distinct notice to the claimant that its claim in excess of that amount would not be honored.

The advice which the Zone Board may have offered as to the remedy open to secure a review of this decision, is not material. The appellant was *sui juris*. The regulations, orders, and procedure of the Department were published and the claimant had full opportunity to learn what its rights in the premises were. It is not averred that there was a specific agreement to leave some portion of the controversy outside of the settlement, and nothing short of such an agreement could avoid the conclusive effect of the settlement.

Six months later, when the awards were made upon both of the appellant's claims and presented to it for acceptance, it had full opportunity to examine them to see what they consisted of and what rights would be affected by their acceptance. Nothing in either award was ambiguous. The first (R. 20, Exhibit C) clearly stated that it was in full satisfaction of the original contract of August 10, 1917; the second (R. 25, Exhibit D) that it was in full satisfaction of an agreement made October 22, 1918. By these awards the Government again stated unequivocally its position with respect to these contracts—that the first had been modified and the second had become effective.

In view of the clear, consistent, and unchanging position which the Government took with respect to these contracts, all of which appears from the averments of the petition, an averment that there was a mutual mistake is so at variance with the

facts pleaded that it can not form the basis of a reformation of the settlement contract.

If any mistake were made it is clear that it was not a *mutual* one, for the purposes, views, and intentions of the War Department were never in doubt. As it is settled that a contract will not be re-formed for a unilateral mistake (*Cramp* v. *United States*, 239 U. S. 221) the petition fails to show ground for the relief prayed for.

III.

There was a complete accord and satisfaction.

The procedure of the War Department in hearing and adjusting claims under the Dent Act was in the nature of negotiations designed to adjust upon a just and equitable basis the losses which contractors would otherwise have suffered from the suspension of their contracts due to the sudden cessation of hostilities. The awards made by the Secretary of War became, when accepted by the contractors, supplemental agreements terminating the contracts.

In the instant case claims of this appellant under its original contract and under the new one were both considered and awards made. They were accepted without protest, exception, or reservation as "full adjustment, payment, and discharge" of both agreements. As the petition fails to impeach these agreements for fraud, accident, or mutual mistake, they stand as a complete accord and satisfaction, and as an insuperable barrier to the appellant's recovery.

The Court of Claims wrote no opinion in this case, but in a recent case which presented a similar state of facts it used language which it might well have used in dismissing this appellant's petition (*Delaine Mills* v. *United States*, 57 Ct. Cl. 453, 459):

> The award and acceptance are conclusive upon the plaintiff's rights under the Dent Act. It is true that section 2 of the act authorizes this court to proceed on petition duly filed in the court where the party affected "shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War," or in the event that he shall fail or refuse to make a satisfactory adjustment. But when the matter has been presented to the Secretary, or the board organized by him to hear and consider it, and an adjustment is offered and accepted as in this instance, there is no basis for further proceeding in the Court of Claims. A salutary purpose of the Dent Act was to produce adjustments and settlements of a specified character of claims and not merely to produce or foster litigation. If the party accept the award the purpose of the Act is accomplished, and there is no need of further litigation.

IV.

The jurisdiction of the Court of Claims.

There can be no doubt after a reading of the second section of the Dent Act that Congress intended that when claims which were within the purview of the Act were presented to the Secretary of War for settle-

ment, jurisdiction of the Court of Claims should attach only if "the individual, firm, company, or corporation shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War * * * or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment, or compensation." (Act of March 2, 1919, c. 94, 40 Stat. 1273.)

That the pinch of this provision was felt in this case is evident from the ingenious method adopted to circumvent it. When it became evident to the contractor that the War Department would not recognize his full claim, he adopted the simple expedient of splitting it into two parts—that which the Department would honor and that which it would not. It then presented what it calls a *new claim* for the part which it knew would be refused. This left it free to accept the award which was made and yet come into the Court of Claims and assert that the Secretary of War had refused to offer satisfactory adjustment of its claim. We are not ready to believe that the evident purpose and design of the Act may be defeated by any such transparent device.

The rule which this Court applied in *Baird* v. *United States*, 96 U. S. 430, where the same device was employed, should be applied here. In that case Mr. Chief Justice Waite said (p. 432):

> But there is another objection to the recovery which is equally good. It is well settled that, where a party brings an action for a part only of an entire indivisible demand, and

> recovers judgment, he can not subsequently maintain an action for another part of the same demand. *Warren* v. *Comings* (6 Cush. Mass. 103). Thus, if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue. Here was a contract by which the Government was bound to pay for the engines in accordance with terms agreed upon. The entire price to be paid was not fixed. A part was contingent, and the amount made to depend upon a variety of circumstances. When the former action was commenced in the Court of Claims, the whole was due. Although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part then sued upon is a bar to this action for the "residue."

As to the jurisdiction which is asserted under Section 145 of the Judicial Code, it may be said that the general rule is that where a specific remedy is afforded by a special statute, that remedy is exclusive, and the enactment of the Dent Act would operate to remove from the jurisdiction of the Court of Claims under Section 145 all cases for which it provided a specific remedy. But even if it be otherwise, and that jurisdiction remain, the fact that the original contract was not executed in accordance with Revised Statutes Sec. 3744 would limit the appellant's recovery to the value of the goods delivered to and accepted by the United States. (*St. Louis Hay, etc., Co.* v. *United*

States, 191 U. S. 159; *Monroe* v. *United States*, 184 U. S. 524; *Clark* v. *United States*, 95 U. S. 539.) As the appellant asserts a division of the original contract, admits the receipt of full compensation for the first 20,000 sets, which exceed the number delivered to the United States, and brings its present suit to recover only its losses for the remaining 15,000 sets of the original order, none of which were delivered, it is clear that the Court of Claims could not render a judgment for the appellant under Section 145 of the Judicial Code.

CONCLUSION.

A receipt in full is most difficult to confess and avoid. The one given in this case is no exception to the rule.

We respectfully submit that the appellant's petition showed no ground for the relief prayed for, and that the judgment of the Court of Claims sustaining the Government's demurrer should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

JANUARY, 1924.

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